No. 127.

Brief of Kimball for Appt.

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SUPREME COURT OF THE UNITED STATES.

Filed Oct. 23, 1897.

OCTOBER TERM, 1897.

NO. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

APPELLANT'S BRIEF.

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellant.

JAMES N. KIMBALL,
Of Counsel.

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STATEMENT.

This action was originally brought by the plaintiffs James C. Armstrong, William Driver, J. H. Spargo, Geo. W. Murphy, John Broom, W. M. Chapman and H. L. Griffin to enjoin the levying of a special assessment to pay the expense of paving a portion of Twenty-fifth street in Ogden City, Utah, known as

District Number 2 (see complaint record pages 1 to 10.) These plaintiffs allege that Ogden City had, through its common council, created such paving district and had published a notice of intention to pave the same, setting out the notice of intention in full (record page 2); that in said notice of intention, March 29, 1892, at 10 o'clock a. m., was fixed as the date when the council would hear objections in writing from any and all persons interested in said assessment; that on that date, viz: March 29, 1892, at 9:55 o'clock a. m., owners of more than one-half of the frontage in feet within said district had filed such objections protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district; that notwithstanding said objection, the mayor and common council were about to and would pass an ordinance levying such an assessment and would let a contract for paving said street and district, and that unless enjoined would levy such assessment and let such contract; that the levying of said assessment would create a lien and cloud upon plaintiffs' title; that the entering into said contract for doing said work, "*if illegal* and *void*," would engender Ogden City and the plaintiffs and all others similarly situated, in a multiplicity of suits and that

great and irreparable injury would result thereby; that the plaintiffs have no plain, speedy and adequate remedy at law.

A demurrer to this complaint was filed in the Court below and sustained. An appeal from this order was taken to the Supreme Court of Utah territory and the judgment of the lower Court was reversed. Pending the appeal, however, the common council levied the assessment complained of and collected the first installment of the tax. After the case was remanded to the Court below, the other plaintiffs about thirty in number, (see record page 202) filed their supplemental complaint (record pages 15 to 19) to enjoin the further collection of the tax which had been levied in ten equal annual installments, and also, to recover judgment against the City for each of the separate amounts of the tax, that each of the said supplemental complainants had paid under a so-called protest (record pages 113 and 114.)

In the supplemental complaint it is alleged that the complainants have a common interest with the plaintiffs in the original complaint; and they allege that each is the owner of a separate and distinct piece of property abutting upon said improvement (record pages 15, 16 and 17); that after the commencement of the

original suit, the common council, on March 22, 1893, had passed the ordinance sought to be restrained in the original complaint (record page 8), and made said ordinance a part of the supplemental complaint, which ordinance they allege "*is and was invalid;*" that in pursuance of said invalid ordinance and unauthorized and invalid proceedings, Ogden City, its officers and agents, were about to expose the real estate described in the original and supplemental complaint for sale to satisfy said illegal assessment, and threatened to continue to sell the said real estate annually for ten years, as each installment of the said tax becomes due.

That said plaintiffs and each and all of said plaintiffs protested against the sale of their property, and the creation of a cloud upon their respective titles, but that said City of Ogden, and its officers and agents, with the defendants, insisted upon said sale, and that said plaintiffs and each and all of them were by said defendants compelled to pay the amounts hereinafter alleged as having been paid, to prevent the sale of their said property, and prevent a cloud upon their respective titles, to-wit: That said J. C. Armstrong was compelled to pay the said City of Ogden the sum of $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman, for the estate of William Chapman, $49.20; Joseph

Clark, for Clark, Emmett & Thompson, $30; William Driver, $60; H. L. Griffin, $23.76; Lamoni Grix, $24.90; Ann Horrocks, $62.40; James E. Horrocks, $62.40; George W. Lashus, $60; H. D and J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morley, $36; Joseph Clark, for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; W. H. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48; and the Nicholas estate, $160.08, by George M. Kerr, administrator of said estate; D. H. Peery, Jr., $24; Realty Company of Kitteny, Maine, a corporation, $748.80; Job Pingree, $35.40; George W. Murphy, $154.20; and Ogden Union Depot and Railway Company, a corporation, $1,188.

That the real estate belonging to the other plaintiffs than these just hereinbefore named was sold by said Ogden City to satisfy the said illegal assessment.

That inasmuch as plaintiffs and each of them are without any speedy and adequate remedy at law for the wrongs in the action alleged, the plaintiffs ask, as they have prayed in the said original complaint and in this supplemental complaint, that said defendants and each of them may be required by this court to make true, specific and full answer to all and singular the allegations aforesaid, and that this

Court will decree that said ordinance and said proceedings thereunder be null and void and of no effect; and in order that the plaintiffs may have justice they further pray that an account may be taken of the amounts paid by them respectively to said Ogden City, its officers and agents, and that said Ogden City and the other defendants, as they shall appear to be liable, may be decreed to pay to the respective parties such amounts as it shall appear they are entitled to, and that the sales of real estate heretofore made may be set aside and annulled and that the Court will grant said plaintiffs and each of them such further relief as shall appear to be just and as to equity appertains.

Ogden City answered the original complaint (record pages 10 to 14) and also the supplemental complaint, (record pages 19 to 25) specifically denying all the allegations therein contained; denied that the plaintiffs or any of them are without any plain, speedy and adequate remedy at law for the said alleged wrongs; that the plaintiffs are estopped because they stood by in silence while the City was constructing the work and until the City had fully paid for it and for that reason cannot now overthrow the proceedings of the City Council and thus escape payment of the said

local tax assessed against their property (records page 23); that the supplemental complaint does not state facts sufficient to constitute a supplemental complaint and does not state anything additional or amendatory to the original complaint, and does not state matters consistent with nor in aid of such original complaint but states or attempts to state a new cause of action and asks other and different relief and attempts to change the nature and object of the original complaint; that the cause of action of the plaintiffs in the supplemental complaint and each and every cause of action of each and every of the said plaintiffs, is barred by the provisions of section 1, chapter 41 Laws Twenty-ninth Legislative Assembly, Utah, approved March 13, 1890, (record page 24); that there is a misjoinder of parties plaintiff in that each one of said plaintiffs is a separate and independent person and the cause of action is to each, separate and independent, requiring of the Court the rendering of a separate and independent judgment for the amount claimed by each and every one of said plaintiffs; that each of said plaintiffs in the supplemental complaint is suing the defendant on a demand for money, the amount being specifically stated, and that each and every one of such claims and demands is for a different amount.

That there is a misjoinder of cause of action in said supplemental complaint in this: That the said supplemental complaint contains causes of action which are not separately stated and cannot properly be united and that they are mingled and combined in the same paragraph; in other words, said supplemental complaint sets forth but one cause of action when in reality it embraces numerous causes of action as follows:

A cause of action in favor of J. C. Armstrong against defendants for the sum of $95.04; a cause of action in favor of Mathias Biel against defendants for the sum of $63; a cause of action in favor of Joseph Clark against defendants for the sum of $48; a cause of action in favor of William Chapman against defendants for the sum of $49.20; a cause of action in favor of Clark, Emmett & Thompson against defendants for the sum of $30; a cause of action in favor of William Driver against defendants for the sum of $60; a cause of action in favor of H. L. Griffin against defendants for the sum of $23.76; a cause of action in favor of Lamoni Grix against defendants for the sum of $24.90; a cause of action in favor of Ann Horrocks against defendants for the sum of $54.60; a cause of action in favor of James E. Horrocks against defendants for the sum of $54.60; a

cause of action in favor of George W. Lashus against defendants for the sum of $60; a cause of action in favor of H. D. and J. S. Lewis against defendants for the sum of $82.08; a cause of action in favor of Carrie Lewis against defendants for the sum of $30; a cause of action in favor of Joseph Morley against defendants for the sum of $36; a cause in favor of Patterson & Clark against defendants for the sum of $60; a cause of action in favor of Patterson & Healy against defendants for the sum of $30; a cause of action in favor of L. R. Rogers against defendants for the sum of $73.04; a cause of action in favor of J. H. Spargo against defendants for the sum of $48; a cause of action in favor of W. H. Stephens against defendants for the sum of $14.70; a cause of action in favor of Carl Sorenson against defendants for the sum of $20.40; a cause of action in favor of W. C. Warren against defendants for the sum of $48; a cause of action in favor of the Nicholas estate against defendants for the sum of $160.08; and that each of said causes of action is not separately stated or set out in a separate clause or count in said complaint, and that said several causes of action as therein alleged do not effect all the plaintiffs therein alike, and that no one of said plaintiffs is in any way interested in the claim sued upon by any one of the

other plaintiffs, but that the demand of each plaintiff, as well as the relief sought by him, is separate and independent to himself. And that such several causes of action, if any cause of action said plaintiffs or any one of them have, do not effect all the parties to the action and are not claims or demands or causes of action against all the defendants.

COUNCIL PROCEEDINGS.

On March 9, 1892, the City Council of Ogden City, Utah, caused a notice of intention to pave the district in question, to be published in the Ogden Daily Standard of Ogden City for the full time required by law and in words and figures following to-wit: (Record pages 7 and 8.)

"NOTICE OF INTENTION

"Of the City Council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expense of such improvement by local assessment.

"The City Council of Ogden City, situate in Weber county, Territory of Utah, gives notice that it intends to make the following improvements, to-wit:

"Pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

"The boundaries of the district to be effected and benefitted are lines running 150 feet back and parallel with the outer line of each side of the streets on each and every block and for the full length thereof therein.

"The estimated cost of such improvement is $40,000.

"For the payment of the cost and expenses thereof the City Council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

"The City Council will, on March 29, 1892, hear objections in writing from any and all persons interested in said assessments.

"By order of the City Council.

"T P. BRYAN,
City Recorder."

On March 29, 1892, at 9:55 o'clock a. m., D. H. Peery and sixty-eight others, claiming to be owners of property abutting upon said improvement filed written objections against the levying of any "local assessment" against or upon their property in the manner and form following:

"The Common Council of Ogden City:

"Gentlemen: We, the undersigned, property owners on Twenty-fifth street, between the west line of Wall avenue and the west line of Washington avenue, and which is designated as paving district No. 2, hereby protest against the levying of any local assessment against or

upon our property for the purpose of paving said street, within said district, and we represent to your honorable body that we are the owners in plat "A," of Ogden City, of the following property, to-wit: (Record pages 145 to 147.)

Name	Frontage of 25th st.	Block
D. H. Peery	Twenty-eighth ft (28)	25
S. C. and W. J. Stephens	Sixty-five ft (65)	24
S. C. Stephens	Twenty-one ft (21)	24
D. M. Stephens	Thirty-five ft (35)	24
W. J. Stephens	Eighty-two ft (82)	24
J. C. Stephens	Twenty ft (20)	19
John Pincock	Twenty-two ft (22)	19
D. H. Stephens	Thirty-two ft (32)	24
Rebecca W. McKee	Seventy-five ft (75)	23
Caleb L. McKee	Twenty-five ft (25)	19
Charles R. Reed	Forty-five and 9 12 ft (45 9-12)	19
R. A. Wells	Forty ft (40)	19
J. H. Spargo	Forty ft (40)	25
John Broom	One hundred and sixty ft (160)	25
Joseph Morley	Thirty ft (30)	25
Lamoni Grix	Twenty-one ft (21)	25
C. F. Kronch	Thirty and 4-12 ft (30 4-12)	24
G. W. Lashus	Fifty ft (50)	20
Mrs. Butterworth and J. M. Major	Fifty-two ft (52)	20
M. Biel	Fifty-two and a half ft (52½)	20
Charles Fuchs	Twenty-five ft (25)	19
Geo. W. Murphy	Twenty-one and a half ft (21½)	25
Geo. W. Murphy	One hundred and seven ft (107)	20
James Thompson	Thirteen and a half ft (13½)	25
James L. Dee	Thirty-one ft 4½ in. (31 4½)	25
Morris Livingston	Nineteen ft (19)	20
J. E. Horrocks	One hundred and twenty-five ft (125)	52
W. Kay	Twenty-two ft (22)	25
Clark, Thompson & Emmet	Twenty five ft (25)	20
Joseph Clark	Forty ft (40)	23
Clark & Patterson	Fifty ft (50)	23
Mrs. H. A. Lewis	Twenty-five ft (25)	23
53d, 76th and 77th Quorum of Seventies, per B. H. Goddard, secretary and treasurer	Forty ft (40)	19
Scudder & Carlson	Twenty-two ft (22)	20
J. H. Cardon	Forty-seven ft (47)	23
J. C. Armstrong	Seventy-nine ft (79)	20

Name	Frontage of 25th st.	Block
C. F. Taylor, by O. E. Hill, agent	Ninety-two ft (92)	24
Emma Munns	Thirty ft (30)	24
John Maguire	Twenty-two and a half ft (22½)	25
Boyle & Patterson	Twenty-five ft (25)	24
H. D. Lewis	Thirty four and a half ft (34½)	24
J. H. Watkins	Twenty one ft (21)	25
E. J Watkins	Twenty ft (20)	25
W. M. Chapman	Forty-one ft (41)	23
Mrs M. E. Fitzgerald	Twenty-five ft (25)	20
C. Sorenson	Seventeen ft (17)	25
John Nicholas, Gomer Nicholas, Jane Nicholas, Rose Nicholas, Leslie Nicholas		
Geo. M. Car, Edministrater	One hundred and thirty-two ft (132)	24
Job Pingree	Twenty-nine and a half ft (29½)	20
Mrs. J. Wagner	Fifty-four ft (54)	19
Mrs. Libbie Wadman	Forty-five and a half ft (45½)	19
A. J. Morrison	Twenty-five ft (25)	20
D. H. Peery, Jr.	Twenty ft (20)	25
Realty Co., by D. H. Peery, Jr., agent	Sixty-two ft (62)	24
E. & H. Madden, by L. R. Rogers, their attorney	Twenty-five ft (25)	23
David Evans, L. R. Rogers & D. H. Peery, Jr.	Sixty-two ft (62)	23
L. P. Burchfield, by D H. Peery, Jr., ag't.	Fifty ft (50)	23

March 28, 1892. Special meeting to hear objections to paving in districts Nos. 1, 2 and 3. (Record page 27.) Council met at 10 o'clock a. m. No quorum being present adjournment was taken until 2 o'clock p. m.

At 2 o'clock p. m., March 29, 1892, council met as per adjournment.

The following members were present at roll call: Councilors Cannon, Calvert, Elliott, McManis and Spencer.

The recorder was instructed to receive any and all documents relating to the paving question, and to note upon the same the time filed, and present to the council, together with the documents now on file, at their next meeting.

Councilor Cannon moved that we postpone further consideration of this question until next Monday morning at 10 o'clock, and that the council to now adjourn until that hour and date.

Special meeting April 4, 1892. Council met at 10 o'clock a. m. as per adjournment. The following members were present at roll call: Councilors Cannon, Dee, Elliott, Graves, Lundy, McManis and Spencer. All protests against levying a local tax in districts Nos. 1, 2 and 3 were read. Councilor Cannon moved that further action be deferred until 3:30 p. m., and that Councilor Elliott be appointed a committee of one to compute by the records the number of front feet protesting against the levying of a tax in the aforementioned districts, and report the result to the council at the adjourned meeting today. Motion carried.

Councilor Elliott moved that Mr. Cannon be appointed a committee of one to consult with the city attorney as to the legality of receiving papers filed since the 29th of March. Motion carried.

On motion of Councilor Graves council adjourned until 3:30 p. m.

Council met at 3:30 p. m.

OGDEN, UTAH, April 4, 1892.

To the Mayor and City Council of Ogden City, Utah.

In the matter of protests referred to me this day against the levying of a local tax for the purpose of paving in districts Nos. 1, 2 and 3, I submit the following report, after having carefully compared said protests with the records, as follows:

(Omitting district No. 1.) District No. 2, total number of feet protesting, 2,315; withdrawals from the same filed March 29, 1892, 432.33 feet; net number of feet protesting, 1,878.66 feet; total number of feet in district, 3,960 feet; number of feet in favor of, 2,081.33; whole number of feet over those protesting, 202.66 feet.

Respectfully submitted,

J. R. ELLIOTT,
Special Committee.

On motion—(going back to record of the council.)—On motion of Councilor Graves the report was accepted and placed on file. On motion of Councilor Cannon, council adjourned at 4:15 p. m.

In time and before the City Council had

acted and passed upon the written objections, and before the Elliott report, withdrawals from the same had been made and filed with the city recorder as follows:

DEFENDANT'S EXHIBIT "B."

To the Honorable Mayor and City Council:

Gentlemen: I hereby request that my name be withdrawn from the remonstrance against paving Twenty-fifth street between Washington and Wall.

Respectfully,

CHARLES FOX.

OGDEN, UTAH, March 31, 1892.

Filed 3—31, '92, 2 p. m.

(Record page 144.)

DEFENDANT'S EXHIBIT "C."

OGDEN, UTAH, April 2, 1891.

Honorable Mayor and members of the City Council:

Gentlemen: Please erase my name from the remonstrance against paving on Twenty-fifth street, between Washington and Wall avenues.

Yours Respectfully,

JOHN MAGUIRE.

Filed 3:15 p. m., April 2, 1892.

(Record page 144.)

DEFENDANT'S EXHIBIT "E."

OGDEN, UTAH, March 29, 1892.

To the Honorable Mayor and City Council of the City of Ogden:

Gentlemen: Having signed a remonstrance against paving Twenty-fifth street through a misunderstanding of the facts in the case as to the costs, etc., we hereby withdraw our remonstrance to said paving.

SCUDDER & CARLSON.

Filed 1:30 p. m., 3—31, '92.

(Record page 144.)

DEFENDANT'S EXHIBIT "J. E. H."

To the Honorable City Council of Ogden City:

After re-considering the matter I hereby withdraw my protest against paving Twenty-fifth street district.

J. E. HORROCKS.

Filed 3—29, 10 a. m.

(Record page 144.)

DEFENDANT'S EXHIBIT "H. A. L."

To City Council, Ogden, Utah:

Will you please see that my name is stricken from the remonstrance that is being circulated opposing the action of the City Council in regard to paving on Twenty-fifth street? I signed the remonstrance without properly understanding its import. I am

in favor of paving. I own property on Twenty-fifth street, and along and in one of the proposed districts. 25 feet.

Very Respectfully,
MRS. H. A. LEWIS.

Filed 3—29.
(Record page 145.)

DEFENDANT'S EXHIBIT "A."

OGDEN, UTAH, April 1, 1892.

To the Honorable Mayor and City Council:

Gentlemen: I hereby request that my name be withdrawn from the remonstrance against paving Twenty-fifth street, between Washington and Wall.

Respectfully,
W. KAY.

Filed 3:25, p. m., April 2, 1892.
(Record page 145.)

DEFENDANT'S EXHIBIT "E. W."

OGDEN CITY, UTAH, March 29, 1892,

To the Honorable Mayor and City Council of Ogden City, Utah Territory.

Gentlemen: We, the undersigned property owners in paving district No. 2, having signed a remonstrance against paving said district, hereby withdraw from said remonstrance our names, and do hereby favor paving the same:

Names.	No. of feet.
C. F. Krouch	30 feet, 4 inches
S. C. and W. J. Stephens	65
S. C. Stephens	21
W. J. Stephens	71
J. C. Stephens	20
D. M. Stephens	35
Mrs. J. Warner	54
G. W. Lashus	50
	346

Filed 3—29, 10 a. m.

(Record page 145.)

PAVING ORDINANCE.

"PLAINTIFF'S EXHIBIT A."

(Record page 8.)

An ordinance creating paving district No. 2 and levying and assessing a special tax on the abutting property in said district to pay the cost of paving therein.

Whereas, The City Council has heretofore ordered to be published in the Standard, a daily newspaper published and printed in Ogden City, for the full period of twenty days the following notice of intention:

"NOTICE OF INTENTION

"Of the City Council of Ogden City of creating a district for paving and of paving and macadamizing the streets therein and to defray the expense of such improvement by local assessment.

"The City Council of Ogden City, situate in Weber county, Territory of Utah, gives notice that it intends to make the following improvements, to-wit:

"Pave and macadamize the following streets: Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue. This shall be known as paving district No. 2.

"The boundaries of the district to be benefitted and effected are lines running 150 feet back and parallel with the outer line of each side of the streets on each and every block and for the full length thereof therein.

"The estimated cost of such improvement is $40,000.

"For the payment of the cost and expenses thereof the City Council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvement.

"The City Council will, on March 29, 1892, at 10 a. m., hear objections in writing from any and all persons interested in said local assessments.

"By order of the City Council.

"T P. BRYAN,
City Recorder."

And whereas the said notice of intention was published daily continuously in said newspaper from March 9 until March 31, 1892, and

Whereas, in said paving district No. 2 there has not been filed written or any objec-

tions to the improvements mentioned, signed by the owners of one-half of the front feet on said Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue, now, therefore, be it ordained by the City Council of Ogden City as follows:

Section 1. That for the purpose of paving Twenty-fifth street from the west line of Washington avenue to the west line of Wall avenue be, and the same is hereby constituted, a paving district, and the same shall be known as paving district No. 2 of Ogden City.

Sec. 2. That said Twenty-fifth street shall be paved from the west line of Washington avenue to the west line of Wall avenue as follows: With Utah sandstone blocks for ten feet out from the curb on each side of said streets, and the balance of said streets with asphaltum. The said pavement shall be laid and constructed under the supervision of the city engineer and shall be done under contract, to be let to the lowest bidder for such work.

Sec. 3. That the cost of making such improvements of laying said pavements (except the intersections of streets and spaces opposite alleys) within said district shall be assessed upon the lots and lands abutting upon Twenty-fifth street in proportion to the front feet so abutting upon said Twenty-fifth street.

Sec. 4. A special tax of $12 per front foot upon the property abutting on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, is hereby levied for the purpose of laying and making said improvement as hereinbefore provided for, and said taxes shall become delinquent, as follows: One-tenth shall be delinquent fifty days after the passage of this ordinance; one-tenth in one year, one-tenth in two years, one-tenth in three years, one-tenth in four years, one-tenth in five years, one-tenth in six years, one-tenth in seven years, one-tenth in eight years and one-tenth in nine years after the passage of this ordinance, and each installment, except the first, shall draw interest at the rate of 7 per cent per annum from and after the passage of this ordinance until the same shall become delinquent, interest at the rate of 10 per cent shall be paid thereon, and such tax shall be enforced as any other cases of special taxes.

Sec. 5. That the Ogden City Street Railway company, a corporation heretofore created and now operating an electric street railway in said paving district on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, be, and it is required and directed to pave all the space be-

tween its different rails and tracks on said Twenty-fifth street, and a space of two feet wide outside of the rails on each side of said track, and also the space between the rails on all side tracks and two feet on the outer side of the rail on each side of the said side tracks at the same time as the paving is done on the other parts of the said street; and the pavement to be laid and made by said street railway company shall be of the same material as the other paving upon said street. That after said pavement is laid said railway company is required and directed to keep that portion of the street which it is herein required to pave in good and proper repair; using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the top rails of the track of its railway.

Sec. 6 That the Ogden Electric Street Railway company known as the Brinker-Henderson company, a corporation heretofore created and now having a street railway track in said paving district, on said Twenty-fifth street, from the west line of Washington avenue to the west line of Wall avenue, be, and it is required and directed to pave all the space between its rails and tracks on said Twenty-fifth street and a space of two feet wide outside

of the rail on each side of the said track, and also the space between the rails on all side tracks, and two feet on the outside of the rails on each side of the said side tracks, of Utah sandstone, of the same kind and quality as that used by the city, at the same time that the paving is done on the other parts of the said street. That after the pavement is laid, said railway companies are required and directed to keep that part of the street which it is required to pave in good and proper repair, using for said purpose the same material that the said street is or shall be paved with, and shall keep the said pavement level with the tops of the rails of the tracks of its railway.

Sec. 7. That George W. Jones, A. J. Warner, A. I. Stone, John Maguire and John H. Restall, members of the council be, and they are hereby, appointed a board of equalization and review of the taxes levied under this ordinance, and upon the completion of the list or lists of the property in said paving district No. 2, to be taxed, the said list or lists shall be placed in the hands of said board, and the said board shall give public notice of the completion of said lists, and shall appoint not less than five consecutive days upon which they will meet during the usual business hours, stating in said notice the place of its meetings,

and during the time specified shall keep the list or lists open to public inspection, and any person or persons feeling themselves aggrieved shall have a hearing before said board, and the said board are hereby granted power and authority to make correction of any tax deemed by them unequal and unjust.

Passed March 22, 1893.

Approved March 25, 1893.

The above ordinance was published for the full time required by law in the Daily Standard, a daily paper published in Ogden City, Utah. (Record page 143.)

COLLECTION OF THE TAX.

The city was on December 30, 1893, collecting the first installment of the tax which the plaintiff in the supplemental complaint paid under protest as follows:

PROTEST.

OGDEN CITY, December 30, 1893.

C. M. Brough, Treasurer of Ogden City:

Notice is hereby given that the undersigned pays the special tax or assessment levied upon his property in paving district No. 2, in said Ogden City, under protest, and intends to sue to recover the money back so paid.

That the grievance and grounds thereof and of this protest are:

First. That on or before March 29, 1892, petitions were filed with the city recorder of said city, signed by property owners in said district, protesting against the levying of any local assessment or tax against or upon their property for the purpose of paving Twenty-fifth street, in said district and city; that the whole number of front feet owned by those persons so protesting with frontage on Twenty-fifth street, in said district, is, and was, about 3,000 feet, which is, and was, more than one-half of the whole frontage on said Twenty-fifth street, within said district, liable for assessment or taxes.

Second. That in letting the contract for said paving said Ogden City limited bidders to bona fide residents of Ogden City, and would not permit general competition for the doing of said paving.

Third. That the notice of intention to create said paving district given by said city was illegal and void in this, that it is, and was, uncertain and indefinite, in that it does not state whether it is, or was, the intention to pave or macadamize said district, and if to pave, the kind of material to be used. That the whole of the lands to be affected by said local assessment is, and was, not sufficiently described. That it provided for the hearing

only of written objections. That the cost of the work could not be properly estimated without designating the kind of material to be used.

Fourth. That said tax or assessment is void and illegal in this: That at the time of creating said paving district or afterwards, there was no provision made for any special fund out of which said pavement should be paid for.

(Signed)

L. R. Rogers,

W. C. Warren,

J. C. Armstrong,

J. H. Spargo,

H. L. Griffin,

Joseph Clark,

Clark, Emmet & Thompson,

Patterson & Clark,

John Nichols Estate, By Geo. M. Carr, edministrater.

John Nichols, by Geo. M. Carr, his agent and attorney in fact.

S. C. Chapman, for the estate of William Chapman, deceased.

William Driver, by G. W. Driver, attorin fact.

G. W. Lashus,

W. H. Stephens,

J. E. and Ann Horrocks,
W. Kay,
John Pincock,
M. Biel,
C. F. Taylor, by J. C. Armstrong.
Job Pingree, by James Pingree, attorney in fact.

Mr. Rogers: Another protest, No. 2.

Provo, Utah, December 8, 1895.

Willis T. Beardsley, Esq., City Auditor, Ogden City, Utah.

Dear Sir: I hereby enter my protest against the payment of the paving tax against the property owned by the Realty company on Twenty-fifth street, Ogden, Utah, and in paying said taxes, I pay it under protest.

Realty Company of Kittery, Maine. By D. H. Peery, Jr., agent.

Protest No. 3.

Provo, Utah, December 8, 1895.

Willis T. Beardsley, Esq., City Auditor, Ogden City, Utah.

Dear Sir: I hereby enter my protest against the payment of paving tax assessed against my property on Twenty-fifth street, Ogden, Utah, and in paying said tax, I pay it under protest.

D. H. Peery, Jr.

The lower Court found for the plaintiffs; made the injunction perpetual and gave each of the plaintiffs in the supplemental complaint a judgment against the city for the amount of the first installment of the tax paid by him under such protest. An appeal was taken to the Territorial Supreme Court and the judgment of the lower Court was affirmed. This appeal is taken from the decision of the Territorial Supreme Court.

ASSIGNMENTS OF ERROR.

First. The Supreme Court of Utah erred in affirming the judgment of the District Court in this:

Because it apppears from the face of the complaint and the supplemental complaint, that the proceedings sought to be enjoined do not cast a cloud upon the title of plaintiffs, and do not entitle plaintiffs to any relief either equitable or legal.

Second. Said Court further erred in affirming said judgment in this:

That the facts found do not entitle plaintiffs to a decree for any relief whatever.

Third: Said Supreme Court further erred in affirming the judgment of the Court below awarding to the plaintiffs individually judg-

ment for the amount of taxes paid, for the reason that said plaintiffs had a legal remedy for the recovery of said taxes under the statute, which remedy was and is exclusive, and for the further reason that said payments were voluntary payments.

Fourth. That the Court erred in rendering judgment in favor of the plaintiffs, and against the defendant.

Fifth. The Court erred in failing to find upon the issue of estoppel raised by the defendants' amended answer to the supplemental case in this: That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed, and that the said assessment complained of was being and had been made, and that the contract complained of was being and had been let, and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavement in said district, and that they, having such knowledge, took no legal steps to stop the said work, or to question the proceedings of the city council until this supplemental complaint was filed in this Court, several months after the work had been accepted by the City Council as being complete, and after the said city had fully paid for the said work,

having thus stood by and in silence as to the levy of said assessment, the construction of said work, and the acceptance of the same, and the city having fully paid for it, the defendants were thus estopped to complain.

Sixth. The Court erred in holding that the plaintiffs had and have no plain, complete and adequate remedy at law, because section 1, chapter 41, of the Laws of the Twenty-ninth Legislatives Asembly of Utah, approved March 13, 1890, provides how and when such payment shall be made, and how and when action may be brought to recover the same, if found to be illegal, inequitable and unjust.

Seventh. The Court erred in holding that the owners of one-half of the frontage in feet on Twenty-fifth street, and within said district, filed objections to making the improvement complained of, or in fact to any improvement or at all, for the reason that the evidence plainly shows that no objections to such improvements were ever filed with the recorder on or before 10 a. m., March 29, 1892, as provided in the notice of intention to improve and pave said street and in accordance with law, or at all.

Eighth. The Court erred in failing to find upon the issue raised by the defendant's answer, that the cause of action of plaintiffs, and

each and every cause of action of each and every one of the plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest, is barred by the provisions of section 1, chapter 41, of the laws passed by the Twenty-ninth session of the Legislative Assembly of the Territory of Utah, approved March 13, 1890.

Ninth. The Court erred in holding that the defendant, Ogden City, in pursuance of an ordinance passed March 22, 1893, were about to expose the real estate described in the supplemental complaint for sale to satisfy an illegal assessment imposed by the said ordinance, and that the parties plaintiffs in this action, after said property had been advertised for sale and was about to be sold to satisfy the said illegal assessment then due, paid, under protest, to said Ogden City, the following amounts, to-witness:

J. C. Armstrong, $95.04; Mathias Biel, $63; Joseph Clark, $48; Samuel Chapman for the William Chapman estate, $49.20; Joseph Clark for Clark, Emmett & Thompson, $30; William Driver, $60; H. L. Griffin, $23.75; Lamoni Grix, $24.90; Ann Horrocks and James E. Horrocks, $124.80; George W. Lashus, $60; H. D. & J. S. Lewis, $82.08; Carrie Lewis, $30; Joseph Morley, $36; Patrick Healy, for Patterson &

Healy, $30; Joseph Clark for Patterson & Clark, $60; L. R. Rogers, $74.04; J. H. Spargo, $48; D. M. Stephens, $14.70; Carl Sorenson, $20.40; W. C. Warren, $48; Geo. M. Kerr, guardian for Nichols heirs, $160.08; D. H. Peery, Jr., $24; Realty Company of Kittery, Maine, $748.80; Job Pingree, $35.40; Ogden Union Depot and Railway company, a corporation, $118.80; George W. Murphy, $154.20.

BRIEF.

The assignments or error 1 and 2 briefly charges that there is no "equity on the bill."

As has been stated, this is an action brought to restrain the collection of and to annul an alleged illegal assessment made by the corporation of Ogden City, which, if legal, is a lien upon plaintiffs' real estate, but the complaint, original and supplemental, do not show that the invalidity of the assessment does not appear in the proceedings of the City Council levying the tax. The failure to make this allegation, we claim, is fatal.

The allegations of the complaint do not bring this case within any of the recognized exceptions to the rule that equity will not grant relief in this class of cases by way of injunction to restrain the collection of a tax. These exceptions are:

1. To prevent a multiplicity of suits.
2. To prevent irreparable injury.
3. To remove a cloud from the title.

The question is, whether the case is within either of these exceptions. If the record by which the tax is levied is void upon its face, then the plaintiffs have a plain remedy at common law. If the record does not show the invalidity of the tax, that fact must be clearly alleged in the complaint; because, if that is not the case, no cloud would be cast upon the title, and no extrinsic evidence, or evidence *de hors*, of the record could be introduced. A failure to make this allegation is fatal.

Heywood v. Buffalo, 14 N. Y., 534.

Guest v. City of Brooklyn, 69 N. Y., 506; page of opinion, 513.

Ewing v. East St. Louis, 5 Wall (U. S.) 413.

Dillon on Municipal Corp., 4th edition, section 611 and cases there cited.

Dows v. City of Chicago, 11 Wallace (U. S.) 109.

The fact that the assessment is divided into ten installments does not bring the case within the first exception. A decision upon one installment would be effective upon all.

Guest v. City of Brooklyn, supra, 513.

The plaintiffs nowhere allege "irreparable injury to the freehold," or to anything or anyone, and if the taxes, on the face of the proceedings, are illegal and void, as alleged, no irreparable injury can follow from the sale of the property.

Dows v. City of Chicago, 11 Wallace 112.

Plaintiffs nowhere allege that the collection of the tax will "engender a multiplicity of suits," nor do they anywhere allege that the collection of the tax will "work irreparable injury." The nearest they come to making any allegations of this kind is found on page 6, folio 15 of record in the original complaint in these words:

"Unless defendants are restrained, they will enter into a contract for doing the work (paving) which, if illegal and void, will engender a multiplicity of suits upon Ogden City and upon the plaintiffs and all others similarly situated.

"That great and irreparable injury will result to these plaintiffs and all other similarly situated if said assessments are made and said contracts for paving entered into by said defendants."

Appellant do not mention "multiplicity of suits" nor "irreparable injury" in the supplemental complaint, but simply adopt and make the original complaint a part of the supple-

mental complaint, and, of course, adopt simply the meaning and words there used.

There the action was to prevent and assessment and the making of a contract. Here and now the object of the action is to set aside the assessment and restrain the collection of a tax.

What can such allegations have to do with the effect of collecting this tax?

Not having alleged that to collect the tax would engender "a multiplicity of suits" or "work irreparable injury to the freehold," and having failed to allege that the record by which the tax was levied, made by the city, *upon its face* fails to show the invalidity or illegality of the tax, plaintiffs have no standing in equity and cannot maintain this action to enjoin the collection of the tax, because to sell the property under the allegations made by plaintiffs in this case in their complaint and supplemental complaint could cast no cloud upon plaintiffs' titles or any of them.

FINDINGS DO NOT SUPPORT THE JUDGMENT.

Under error No. 2 herein assigned we make the further point that the judgment in this case is not supported by the findings. The lower court made findings as follows: (Record pages 185, 186, 187 and 188.)

6. That on March 29, 1892, at 9:55 o'clock a. m., D. H. Peery and sixty-eight others, including all the plaintiffs in this action and in the supplemental complaint who were then the owners of real property within the said paving district No. 2, and with frontage on Twenty-fifth street within said paving district, *filed* a protest with the said recorder of said Ogden City, protesting against the levying of any local assessment against or upon their property for the purpose of paving said street within said district. *That said persons so protesting owned and protested for more than one-half of the whole frontage on said Twenty-fifth street within said district, to-wit: 2,414 feet* That after said hour of 10 o'clock a. m., of said day certain persons who had protested to the amount of 302¼ feet, withdrew their protests, leaving at all times 2,111¾ feet frontage on said Twenty-fifth street, in said district, still protesting against the said local assessment. That the total number of feet fronting on said Twenty-fifth street, in said paving district, as mentioned in said notice of intention, above set forth, was 3.960, of which 660 feet belonged at said time and still belongs to said Ogden City, and was then and is now used for public purposes by the said city; and 125 feet of said frontage was then, and is now, the property of the said Ogden City, and was public school property, used and owned for public schools.

The Supreme Court of Utah Territory in affirming the decision of the lower Court adopted and made such finding its own.

Cannon v. Pratt, 99 U. S. 619 p. opin. 621-622.

The Court finds that "more than one-half of the whole frontage on said Twenty-fifth street within said district, to-wit: 2414 feet" had protested. This is a finding that, upon the face of the record, the City Council had no jurisdiction or authority to pass the ordinance to pave or to make the improvements complained of, and it follows that if this is so appellee had a plain, speedy and adequate remedy at law, because the assessment and levy of the tax could not cast a cloud upon the title.

Dows v. City of Chicago, supra.

REMEDY AT LAW.

Appellant's contention now is that the action by injunction cannot be maintained for the reason that the plaintiffs have a plain, speedy and adequate remedy at law. (Error 7, Record page 203.)

"Where a statutory remedy is given it must be followed, or, in other words, the plaintiffs are concluded by the remedy provided in Section 1, Chapter 41, of Laws of 1890, which reads as follows:

"And no such special tax shall be declared void, nor shall any such assessment or part thereof be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling

aggrieved by any such special tax or assessment or proceeding may pay the said special tax assessed upon his, her or its property, or such installments thereof as may be due at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter *and not later to recover* so much of the special taxes paid as he shall show to be *illegal, inequitable* and *unjust*, the cost to follow the judgment to be apportioned by the Court, as may seem proper, *which remedy shall be exclusive.*

The city collector shall promptly report all such notices to the City Council for such action as may seem proper. No Court shall entertain any complaint that the party was authorized to make and did not make to the City Council sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof, nor any complaint that does not go to the groundwork, equity and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable and unjust shall rest upon the party who brings such suit."

"A Court of equity is not a Court of errors, to review the actions of public officers in the assessment and collection of taxes, and will not revise their decision. The law has provided a particular mode for the settlement and decision of errors in behalf of persons dissatisfied with the tax, and they must avail themselves of the

legal remedy thus prescribed, and will not be allowed to waive such relief and seek in equity to enjoin the collection of the tax."

Warden v. Board of Supervisors, 24 Wis. 672.

Macklot v. City of Davenport, 17 Iowa 385.

People v. Arguello, 37 Cal. 524.

Saving and Loan Society v. Austin, 46 Cal. 488-89-90.

Houghton v. Austin, 47 Cal. 651.

"If the tax, as assessed, is illegal and void, as insisted by the plaintiff, he had an ample remedy at law—could have paid the tax under protest and recovered it back by a suit at law against the city."

C. P. R. R. Co. v. Corcoran, 48 Cal., pp. 69 and 70.

Dill on Municipal Corp., sec 906 and note.

"If there is a remedy by statute by suit at law, either before or after payment, equity will not grant relief."

R. R. Tax Cases, 92 U. S. 555; p. of opinion, 614-15.

Shilton v. Platt, 139 U. S. 591; p. of opinion, 594-5-7.

Snyder v. Marks, 109 U. S. 189; p. of opinion, 193.

Dows v. Chicago, 11 Wall, 110.

COLLATERAL ATTACK.

Under this head "no equity in the bill," (assignments of error 1 and 2) we raise another question which we claim is vital in this case, viz: That when the City Council has obtained jurisdiction of the subject matter by giving notice to pave as was done in this case, and are thus empowered to pass upon the facts essential and sufficient to dislodge it of the jurisdiction already acquired by giving notice, its decision is *conclusive* against a collateral attack by way of injunction, as is attempted in this case.

The law giving the City Council this power is Section 13 Chapter 41 of the Laws of the Twenty-ninth Session of the Legislative Assembly of the Territory of Utah, 1890, and is as follows:

"In all cases before the leuy of any taxes for any improvements provided for in this act the City Council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within said city. Such notice shall describe the improvements so proposed, the boundaries of the district to be effected or benefitted by such improvement; the estimated cost of such improvement and desiginate the time set for such hearing. If at or before the

time so fixed, written objections to such improvement signed by the owners of one-half of the front feet abutting upon that portion of the street, lane, avenue, or alley to be so improved, be not filed with the recorder, the council shall be deemed to have acquired jurisdiction to order the making of such improvement."

In passing upon this question, it is first necessary to decide what constitutes jurisdiction, and in making this decision it is necessary to keep in mind the fact that the mode of procedure prescribed by the statutes of this territory is different than that of nearly every other state or jurisdiction known to the books.

Chapter 41, laws of 1890, under which this assessment was made, gives the City Council power to put its hand to the machinery and set it in motion. Thus, it will be seen that the law gives the City Council jurisdiction to make the assessment and it need not go to the people and ask them to delegate that power. The only prerequisite to giving the City Council full jurisdiction is that such council shall publish a notice of intention as prescribed by law fixing a time when it will hear objections to making the improvement, signed by the owners of one-half of the front feet abutting upon that portion of the street to be improved. In other words, by the publication

of the notice of intention for the required time, gives the City Council absolute jurisdiction to make the improvement, and the only way that the jurisdiction can be dislodged, is that the owners of one-half of the frontage in feet abutting upon that portion of the street to be improved shall have filed their objections in due form on or before the time fixed in the notice with the city recorder. That is to say, that if such objections be not filed with the recorder the City Council shall be deemed to have acquired jurisdiction; that is, they acquired jurisdiction by publishing the notice of intention, but it can be taken away by the objection of the owners of one-half of the frontage.

That the City Council before taking any steps to make this assessment, published the requisite notice of intention to pave, is not questioned. Indeed, the sufficiency of this notice was passed upon favorably when this case was formally before the Utah Supreme Court. (See Armstrong vs. Ogden City, 9 Utah page 275), and that said notice was published for the full twenty days as required by the statute, is fully shown by the proof of publication of such notice to have been over twenty-one days; in fact, in a daily newspaper published in the City of Ogden, viz: The Standard.

It only remains now to determine whether or not the City Council was dislodged of its jurisdiction thus acquired by the objection of the owners of one-half of the frontage in feet abutting upon the street to be paved, by having filed such objections in proper form and in time, with the city recorder, as the law requires.

Appellants contention is that the council having acquired jurisdiction by publication of the notice of intention according to law, it thus became a tribunal of orignal jurisdiction to decide and pass upon the question of whether or not the owners of one-half of the frontage in feet abutting upon that portion of the street to be improved, had, in fact, filed objections with the city recorder, as required by law, and that such decision and judgment is conclusive when collaterally attacked in this way. It would not be conclusive in action by certiaori to set aside the assessment nor in action by ejectment to try title to the premises under tax deed, but it is conclusive as against an action by injunction to prevent the collection of the tax.

In commenting upon this subject, Elliott, on Roads and Streets, page 218 and 219, says:

"In almost all of the states the original proceedings are had before local tribunals, as

boards of supervisors, boards of commissioners, county judges and common councils, but whatever may be the title or the tribunal upon which the authority to direct the opening of streets and roads is conferred, its authority is, in such matters, of a judicial nature. These tribunals are not always, in the strictest sense of the term, courts, but when acting in the matter of opening streets and roads they are engaged in the exercise of judicial functions. Boards of county commissioners and boards of supervisors are, when engaged in hearing controversies respecting the opening of roads and streets, regarded as courts of statutory jurisdiction. Such boards possess power of a judicial nature and also administrative and ministerial powers, but in hearing highway cases they exercise judicial functions.

"It is essential to the validity of these proceedings that the tribunal before which they are prosecuted should have jurisdiction, both of the subject matter and of the persons of those whose lands are sought to be appropriated. There is some diversity of opinion, but the weight of authority is that the jurisdiction must appear on the face of the record, and there are some cases that go so far as to hold that the presumption is against jurisdiction unless the face of the record discloses facts which confers jurisdiction. It is, however, generally agreed that if the record affirmatively shows jurisdiction, then the same presumptions will be indulged in favor of the proceedings as are indulged in favor of proceedings in courts of general jurisdiction. The judgment of an inferior court upon jurisdic-

tional facts is generally regarded as conclusive, and where there is a judgment necessarily affirming that jurisdiction exists and this judgment could not have been pronounced without passing upon jurisdictional facts, it will be conclusive as against all collateral attacks. It is not necessary that there should be a formal judgment expressly affirming that jurisdiction exists, nor is it necessary that there should be an express finding of jurisdictional facts, for it is enough if the judgment impliedly asserts the existence of jurisdiction."

It must be remembered that jurisdiction appears upon the face of this record and that the city council decided in a judicial way that it had jurisdiction. It did this by passing upon and deciding that objections filed with the city recorder, if, in fact, any objections ever were filed, were not sufficient to legally prevent the council from making the assessment complained of and by passing the ordinance levying the assessment. This must be so, for to hold otherwise would be to admit that the record upon its face shows that the City Council did not have jurisdiction, and in such case the complaint herein would have to be dismissed for want of equity, for no court would hold that a title which would result from a sale to recover these delinquent taxes, which is based upon a record showing no jurisdiction to levy the tax, would even cast a cloud upon

plaintiffs' title, and in such case plaintiffs would have a plain, speedy and adequate remedy at law. It must be true that under the provisions of section 13, chapter 41, of the laws of 1869, that the City Council is empowered to make such decisions, for if not, what tribunal is to decide? We claim that the City Council has this power. It may be true, and doubtless is true, that if the action of the City Council was attacked for fraud or mistake, such fraud or mistake could be shown in a collateral proceeding like this. Our claim is that no fraud or mistake being alleged in the complaint, the judgment of the City Council is a judicial one and cannot be reviewed except in a direct proceeding, that is by *certiorari* to correct the record.

"If the preliminary facts are sufficient to authorize the tribunal to proceed in the matter there is jurisdiction, and, although subsequent errors and irregularities may intervene, the proceedings will be valid unless avoided by appeal or certiorari."

Elliott on Roads and Streets, p.p. 224-243.

"Where, however, there is a petition not plainly insufficient upon its face, but sufficient in form and substance to require a judgment upon its sufficiency, the judgment, whether formally expressed or not, will uphold the proceedings as against a collateral attack made after the work has been completed."

Elliott on Roads and Streets, p. 383.

"In all cases where there is a permanent tribunal to approve or reject a report, there is a tribunal competent to render a judgment strong enough to resist collateral attack."

Van Fleet on Coll. Attack, Sec. 63.

Elliott on Roads and Streets, p. 259.

Beach on Public Corporations, Sec. 1130.

"A common council is such a tribunal."

Van Fleet on Coll. Attack, Sec. 801.

Town of Colma vs. Eaves, 92 U. S. 484.

Commissioners vs. Aspinwall, 21 Howard, 539; page of opinion, 544.

Bissell vs. City of Jeffersonville, 24 Howard, 287; page of opinion, 296 to 299.

"No error of fact makes the judgment void."

Van Fleet on Coll. Attack, Sec. 526 and Notes.

The plaintiffs have had one trial in this matter before the City Council; they were summoned into court by virtue of a notice of intention and submitted the controversy to the judicial decision of the City Council, and now they are asking another trial in this Court by making a collateral assault upon that decision, and that this is a collateral assault; see:

Montgomery vs. Wassam, 15 N. E. Rep., p. 795.

Montgomery vs. Wassam, 19 N. E. Rep., p. 184.

Van Fleet on Coll. Attack, Secs. 3 and 4.

"Acts of the council in deciding the sufficiency of the protest is a judicial one."

Elliott on Roads and Streets, pp. 218 and 219.

"The record need not show a formal judgment. If the preliminary facts are sufficient to authorize the tribunal to proceed, then there is jurisdiction. The proceedings will be valid until avoided by appeal or certiorari."

Elliott on Roads and Streets, p. 224.

The District Court did not find on all the material issues raised by the answer of the city, viz: the following: (Record page, 23 and 24.)

The Court erred in failing to find upon the issue of estoppel raised by the defendants' amended answer to the supplemental complaint in this: That the plaintiffs named in the supplemental complaint had full knowledge before and at the time that the said pavement was being constructed and that the said assessment complained of was being and had been made and that the contract complained of was being and had been let and that the city, defendant herein, was about to and was expending large amounts of money in constructing said pavement in said district, and that they, having such knowledge, took no legal steps to stop the said work or to question

the proceedings of the City Council until this supplemental complaint was filed in this Court, several months after the work had been accepted by the City Council as being complete, and after the said city had fully paid for the said work, having thus stood by and in silence as to the levy of said assessment, the construction of said work and the acceptance of the same, and the city having fully paid for it, the defendants are estopped to complain.

The Court erred in failing to find upon the issue raised by defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of said plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest is barred by the provisions of Section 1, Chapter 41, of the laws passed by the twenty-ninth session of the Legislative Assembly of the Territory of Utah, approved March 13, 1890. (Assignment 10 a. Record page 177.)

A bare inspection of the answer and findings adopted by the Territorial Supreme Court, will show this. This failure was error for which the judgment should have been reversed.

The statutes of the United States, Chapter 80, Page 12, Volume 1, Supplement to the Revised Statutes of the United States, requires the Territorial Courts to proceed in accordance with the Territorial Code of Civil Procedure, in all cases both in law and in equity.

The Code of Civil Procedure of Utah by Sections 504 and 505, which read as follows, require findings of fact in writing, and it must appear affirmatively that findings were made and that they support the judgment:

"Sec. 504. Upon a trial of a question of fact by the Court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision."

"Sec. 505. In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the findings must be entered accordingly."

U. P. R. R. Co. vs. Reynold, 50 Cal., 93.

Under this system a finding is required on every material issue.

U. P. R. R. Co. vs. Reynolds, supra.

Campbell vs. Bochman, 49 Cal., 367.

Dows vs. Clark, 51 Cal., 263.

Watson vs. Cornell, 52 Cal., 91.

O'Connor vs. Frasher, 53 Cal., 435.

While it is true that under this system, the appellate Court will presume, if no findings appear in the record, that they were waived in the Court below, this presumption does not obtain when findings on some of the issues appear in the record.

People vs. Fuqua, 61 Cal., 377.

In this case the Court says: "It has been repeatedly held by this Court that the failure of the trial Court to find upon all the issues raised by the pleadings was a sufficient ground for the reversal of the judgment. It has never been suggested in such case that the failure to find upon all the issues would raise a presumption that those not found upon had been abandoned on the trial."

Our contention in the matter of the estoppel is that all the plaintiffs in the supplemental complaint are estopped because they have stood by, well knowing that the City Council had levied the assessment complained of; that the city was making the improvement, and did not bring action to restrain the council or the city from doing the work until the work was completed and the contractors paid for doing the same, in full.

Dillon Municipal Corp., Sec. 924 and notes.

Elliot Roads and Streets, p. 384.

Montgomery v. Wasson, 19 N. E. Rep., 184.

Montgomery v. Wasson 15 N. E. Rep., 797.

Sanborn v. Manistee, 53 N. W. Rep., 161.

Richy v. Topeka, 16 Pac., 332.

Patterson v. Rainer, 43 Iowa, 477.

The statute under which this assessment is made is an exact copy of the charter of the

city of Omaha upon this subject; in fact, it was copied after that law.

The Supreme Court of Nebraska has just construed this statute in a case where action was brought to enjoin the collection of a tax, and holds as follows:

"Injunction will not lie where the action was not commenced until the work was completed and no offer to tender any portion of the tax was made; even where it is alleged that the assessment is absolutely void."

Redick v. Omaha, 52 N. W. Rep., p. 847.

City of Elkhart v. Wickwire, 22 N. E. Rep., p. 342.

STATUTE OF LIMITATIONS.

The court failed to find upon the issue raised by defendants' answer (Record page 24) that the causes of action in the supplemental complaint, and each of them, are barred by the statute of limitations, and this is assigned as error. (Record page 177.)

(a) The Court erred in failing to find upon the issue raised by defendants' answer that the cause of action of the plaintiffs and each and every cause of action of each and every one of said plaintiffs in the supplemental complaint for the recovery of taxes paid under the so-called protest, is barred by the provisions of section 1, chapter 41, of the laws passed by the twenty-ninth session of the Legislative Assembly of the territory of Utah, approved March 13, 1890.

The first installment of the tax became delinquent fifty days after the passage of the ordinance (Record page 9), or on May 12, 1893. It was paid under what is termed a protest on December 30, 1890 (Record page 113), and suit was brought to recover the amount so paid by the supplemental complaint herein, filed April 9, 1894, (Record page 19), or ninety-nine days after payment.

Appellants' contention is that so far as a money recovery is concerned in this case, the plaintiffs are barred by the provisions of section 1, chapter 41, of the laws of 1890, herein before set out. That section provides, among other things, that:

"Any party feeling aggrieved by any special tax or assessment or proceeding may pay the tax assessed or levied upon his property at any time before the same shall become delinquent, under protest and with notice in writing to the city collector that he intends to sue to recover the same, whereupon the party shall have the right to bring a civil action within sixty days thereafter, and not later, to recover so much of the special tax paid as he shall show to be illegal, inequitable and unjust."

We claim that after the installment of tax became delinquent, plaintiff could not pay under protest, that is, a protest then would not avail plaintiff; but grant that if payment was

made after tax became delinquent, and plaintiff could insist upon that protest, even if in good and legal form, yet none of the plaintiffs brought suit to recover for more than sixty days after payment.

If the Court had found upon this issue, and also that of estoppel, the findings must have been in favor of the defendant, hence failure to find is error.

"Findings of fact must be responsive to all the material issues raised by the pleadings."

Carson v. Thews, 9 Pac Rep., 609.

Hathaway v. Ryan, 51 Cal., 191.

Le Cort v. Oullahan, 52 Cal., 252.

"To limit the time of bringing action to sixty days is not unconstitutional."

Dillon Municipal Corp., Section 67 and note.

"On the ground that legislation concerning municipal corporations is of a peculiar character on account of their being agencies of the government, the Court of appeals of Kentucky holds that a charter provision limiting the right to bring actions to recover money improperly paid for taxes to six months when the general statutes of limitations allow five years in such cases, was no unconstitutional for granting a special privilege."

Covington v. Hoadley, 83 Ky., 444.

Statute applies to suits in equity as well as in law. (Of course this is elementary.)

Chemical Bank v. Kissimee, 32 Fed. Rep., 429.

Fogg v. Price, 14 N. E. Rep., 741.

Dist. Twp. of Spencer v. Dist. Twp. of Riverton, 62 Iowa, 30.

NO SUFFICIENT PROTEST FILED

We contend that no such written objections were filed with the city recorder in this case. The objections filed were in words and figures following. (Record page 7.)

> To the Common Council of Ogden City.
>
> "Gentlemen:—We, the undersigned property owners on Twenty-fifth street, between the west line of Wall avenue and the west line of Washington avenue to Wall, designated as paving district No. 2, hereby protest against the levying of any local assessment against or upon our property for the purpose of paving said street within said district, and we represent to your honorable body that we are the owners in plat "A" of Ogden City of the following property, to-wit:"

This notice does not protest or purport to protest against the designated *improvement*, but only protests against the making and levying of the local assessment for the improvement. In other words, the parties protesting have no

objection to the improvement, but simply to the local assessment; while the statute itself requires that the protest should be to the *improvement itself*.

We further contend that no written objections were filed to the improvement sufficient in number under any aspect of the case. Undoubtedly the City Council had the power to determine whether the requisite number of feet had protested to defeat the jurisdiction.

(Laws of 1890, Appendix Sec. 13.)

The City Council determined that matter on April 4, 1892, and determined that 202½ feet less than the whole number required by the statute to defeat the jurisdiction had protested. (Record pp. 124 and 1437.)

In determining this matter the City Council was acting in a proceeding duly inaugurated and acting judicially, and such action cannot be reviewed in an equitable action to restrain the collection of the tax, but should be reviewed, if at all, by certiorari, in which action the whole record would be removed to the District Court.

The statute of this territory, unlike most statutes on the same subject, does not require a petition of the majority or any number of owners of property to petition to have the im-

provement made, but confers the jurisdiction in the City Council to make the improvement, unless the owners of one-half of the feet abutting upon the improvement protest against it. There was a total of 3,960 feet abutting upon the proposed improvement and street; the total number of feet that protested was 2,315; from that number 436½ feet withdrew, leaving only 1,878½ feet with protests on file on the day required by the notice. These withdrawals having been made before the final hearing and determination by the council, even if we conceded the protest itself to be sufficient as being made against the improvement, left the City Council free to act.

Irwin v. Mobile, 57 Ala., p. 6.

It was contended by appellants, or was in the court below, tnat what is known as the city hall property, and what is known as the school trustees' property, consisting in the one case of 660 feet, and in the other case of 125 feet, should not be counted in the number of feet in the paving district.

It appears from the record, pages 174 and 175, that these properties were included within the district and neither of them protested. We cannot imagine upon what principle they should be excluded from the number of feet in

the district, nor why they should not be counted in determining the number of feet protesting. It is true that the city hall property was not subject to the tax, being property owned by Ogden City corporation, and that the cost of paving in front thereof must be borne out of the general fund. (See laws of 1890, page 57). But these facts did not and could not in our judgment prevent its being counted in favor of the improvement in its front, as it was controlled by the City Council.

VOLUNTARY PAYMENT.

The Supreme Court of Utah erred in rendering judgment awarding the plaintiffs individually, judgment for the assessment of taxes paid (error three, this brief) because the payments were voluntary. This question is raised in defendants answer. (Record page 22). We also claim that the said Court erred in not finding upon this issue of voluntary payment.

1. The payments were not made before same became delinquent. (Laws of 1890, page 58.) The statute is in these words:

> "But any party feeling aggrieved by any such special tax may pay same or any installment thereof as may be due, *at any time before the same shall become delinquent under protest*, and with notice to the city collector that he intends to sue to recover the same."

Two things are absolutely necessary—[a] the payment must be made under protest before delinquency—[b] the protest must be in writing and must particularly state that the party "*intends to bring suit to recover the amount so paid.*"

The first installment which was paid under the so-called protest became delinquent May 12, 1893. (Record page 9). Payment was made under the protest December 30, 1893. (Record page 113).

A voluntary payment of tax illegally assessed can not be recovered back, even if void, and it makes no difference that the payment is made simply to prevent a levy on the land.

Dewill v. Mortaon, 34 Mich., 170.

Curtis v. Saginaw, 35 Mich., 508.

Rogers v. Greenbush, 4 Am. Rep., 292.

R. R. Co. v. Commissioner, 98 U. S., 541; pages of opinion, 544-5.

We contend that the judgment should be reversed.

R. H. Whipple,
T. D. Johnson,
Attorneys for Appellants.

James N. Kimball,
Of Counsel.

APPENDIX.

CHAPTER XLI., LAWS 1890, UTAH.

MUNICIPAL CHARTERS.

AN ACT supplementing and amending the charters, and defining, prescribing and regulating the powers, duties and government of cities of the first and second class.

SECTION 1. *Be it enacted by the Governor and Legislative Assembly of the Territory of Utah:* That the city council of each city of the first and second class in the Territory of Utah, shall have the following powers: To lay out, establish, open, alter, extend, widen and improve streets, alleys, avenues, sidewalks, parks and public grounds and vacate the same; and to grade, curb and gutter, park and beautify or otherwise improve and keep in good repair, or cause the same to be done in any manner they may deem proper, any park, street, avenue or alley within the limits of the city, and may grade partially or to the established grade, or park or otherwise improve any part of such street, avenue or alley, and may also construct and repair, or cause and compel the construction and repair of sidewalks in such city, of such material, and in such manner as they may deem proper and necessary; and to defray or cause to be defrayed the cost and expense of such improvements or any of them;

the council of such city shall have power and authority to levy and collect special taxes and assessments upon the blocks, lots or parts thereof, and pieces of ground adjacent to or abutting upon the street, avenue, alley or sidewalk thus in whole or in part opened, widened, curbed and guttered, graded, parked, extended, constructed or otherwise improved or repaired, or which may be especially benefitted by any of said improvements; provided that the above provisions shall not apply to ordinary repairs of streets or alleys and one-half of the expense of bringing streets, avenues, alleys or parts thereof to the established grade shall be paid out of the general fund of the city; and such council shall have power to pave, repave or macadamize any street or alley or part thereof in the city, and for that purpose to create suitable paving districts, which shall be consecutively numbered, such work to be done under contract, and under the superintendence of the board of public works of the city.

The cost of paving, macadamizing or repaving of the streets and alleys within any paving district, except the intersection of streets and space opposite alleys within such district, shall be assessed upon the lots and lands abutting upon the streets and alleys in such district, in proportion to the square feet or feet front or both so abutting upon such streets and alleys. The assessments of special taxes for paving purposes herein provided for, shall be made as follows:

The total costs of the improvements shall be levied at one time upon the property and become delinquent as herein provided:

One-tenth (1-10) of the total amount shall be delinquent in fifty days after such levy, one-tenth (1-10) in one year, one-tenth (1-10) in two years, one-tenth (1-10) in three years, one-tenth (1-10) in four years, one-tenth (1-10) in five years, one-tenth (1-10) in six years, one-tenth (1-10) in seven years, one-tenth (1-10) in eight years, and one-tenth (1-10) in nine years; each of said installments, except the first, shall draw interest at the rate of seven per cent. per annum from the time of levy aforesaid, until the same shall become delinquent, and after the same shall become delinquent, interest at the rate of 10 per cent. per annum shall be paid thereon. Such taxes shall be collected and enforced as in other cases of special taxes. In cases of omission, errors or mistakes in making such assessment or levy in respect of the total cost of the improvements, or deficiencies or otherwise, it shall be competent for the council to make a supplemental assessment and levy to supply such deficiencies and omissions, errors or mistakes. The cost of paving, macadamizing or repaving the intersection of streets and space opposite alleys in any paving district, shall be paid by the city as hereinafter provided; but nothing herein contained shall be construed to exempt any street railway company from keeping every portion of every street, avenue and alley used by it, upon or across which its tracks shall be constructed at or near the grade of such streets in good and safe condition for public travel, and skall keep the same plank, paved, macadamized or otherwise in such condition for public travel as the city council of such city may

from time to time direct, keeping the plank-pavement or other surface of the street or alley level with the top of the rails of the track of such street railway. The portions of the streets or alleys to be so kept and maintained by all such street railway companies shall include all the space between its different rails and tracks, and also a space outside of the outside rail of each outside track of at least two feet in width, and the tracks herein referred to shall include not only the main tracks, but also all side tracks, crossings and turnouts, constructed for the use of such street railways.

If any company shall have laid tracks upon the streets or highways of any city and failed to operate them with cars for public use for the period of nine months after the laying thereof, tuch tracks may be declared a nuisance and taken up by the city and removed.

For the purpose of paying the cost of paving, macadamizing or repaving the streets and alleys in any paving district exclusive of the intersections of streets and space opposite alveys therein, the council shall have power, and may by ordinance cause to be issued bonds of the city, to be called "District Paving Bonds of District No. ———," payable in not exceeding ten years from date, and to bear interest payable annually, not exceeding the rate of 6 per cent. per annum, with interest coupons attached, and in such case shall also provide that said special taxes and assessments shall constitute a sinking fund for the payment of said bonds and interest, and said bonds shall not be sold for less than their par value, pro-

vided that the entire cost of paving, repaving or macadamizing any such streets, avenues or or alleys, properly chargeable to any blocks, lots of lands or part thereof within any such paving district according to the front feet or square feet thereof may be paid by the owner of such lots or lands within fifty days from the levy of such special taxes and thereupon such lots or lands shall be exempt from any lien or charge therefor.

Whenever the council deem it expedient, they shall have power, for the purpose of paying the cost of paving, repaving or macadamizing the intersection of streets and spaces opposite alleys in the city, to issue bonds of the city, to run not more than twenty years, and to bear interest payable semi-annually at a rate not exceeding six per cent. per annum, with coupons attached, to be called "paving bonds," and which shall not be sold for less than their par value, and the proceeds of which shall be used for no other purpose than paying the cost of paving, repaving or macadamizing the intersections of streets and alleys in the city. *Provided*, That the aggregate amount of such bonds issued in any one year shall not exceed the sum of one hundred thousand dollars ($100,000); and if in any such city there shall be any real estate not subject to assessment of special taxes for paving purposes, the council shall have the power to pave in front of the same and to pay the cost thereof that would otherwise be chargeable on such real estate, in the same manner as herein provided for the paving of intersection of streets and paying therefor. The word "lot" as in this

act used shall be taken to mean any subdivided real estate. The word "lands" shall mean any unsubdivided real estate. The word "street" shall be deemed to include boulevard and avenue.

Provided, That if the lots and real estate abutting upon that part of the street ordered, repaved or macadamized as shown upon any such recorded plat or map are not of uniform depth, or if for any other reason it shall appear just and proper to the council, the council are authorized and empowered to determine and establish the depth to which the real estate shall be charged and assessed with the cost of the improvement, and such depth shall be determined and established according to the benefits accruing to the property by reason of the improvement. The council shall include in the paving district all the real estate to be benefitted by such improvement and shall cause it to be charged and assessed with the cost of such paving or improvement as in this section hereinafter provided. The provisions of this section in regard to the depth to which real estate may be charged and assessed, shall apply to all special taxes that may be levied, except for sidewalk in proportion to the front or square feet. Whenever curbing, or curbing and guttering is done upon any street or avenue in any paving district in which paving has been ordered, and the council shall deem expedient so to do, they shall have power and authority, for the purpose of paying the cost of such curbing and guttering to cause to be issued bonds of the city, to be called "Curbing and Guttering Bonds of Paving District No.

————," payable in not exceeding ten years from date, and to bear interest payable annually, not exceeding the rate of six per cent. per annum, with interest coupons attached, and in such cases, shall assess at one time the total cost of such curbing and guttering, or curbing as the case may be, upon the property abutting or adjacent to the portion of the street or avenue so improved, according to special benefits; such assessment to beceme delinquent the same as the assessment of special taxes for paving purposes, and to draw the same rate of interest and be subject to the penalties, and may be paid in the same manner as special taxes for paving purposes, and the special taxes so assessed shall constitute a sinking fund for the payment of said bonds and interest, and said bonds shall not be sold for less than their par value, and no such special tax shall be declared void, nor shall any such assessment or part thereof, be set aside in consequence of any error or irregularity committed or appearing in any of the proceedings under this act or the acts of which it is amendatory; but any party feeling aggrieved by any such special tax or assessment or proceeding may pay the said special taxes assessed or levied upon his, her or its property or such installments thereof as may be due, at any time before the same shall become delinquent, under protest, and with notice in writing to the city collector that he intends to sue to recover the same, which notice shall particularly state the alleged grievance and grounds thereof, whereupon such party shall have the right to bring a civil action within sixty days thereafter, and

not later, to recover so much of the special taxes paid as he shall show to be illegal, inequitable and unjust, the cost to follow the judgment to be apportioned by the court as may seem proper, which remedy shall be exclusive. The city collector thall promptly report all such notices to the city council for such action as may be proper. No court shall entertain any complaint that the party was authorized to make, and did not make to the city council sitting as a board of equalization, nor any complaint not specified in said notice fully enough to advise the city of the exact nature thereof; nor any complaint that does not go to the groundwork equity and justice of the tax. The burden of proof to show such tax or part thereof invalid, inequitable or unjust, shall rest upon the party who brings such suit.

Provided, That the city council shall provide by ordinance, that upon the levying of any tax under the provisions of this act and the completion of the list or lists of the property in any of the districts taxed, five of its members shall be appointed as a board of equalization and review, and the list or lists shall be placed in the hands of said board, and the said board shall give public notice of the completion of the said lists and appoint not less that five consecutive days upon which they will meet during the usual business hours and state the place of its meeting, and during the time specified the said list or lists shall be open to public inspection, and any person or persons feeling themselves agrieved shall have hearing before said board, and the said board

shall have the authority to make correction of any tax deemed by them unequal or unjust.

Sec. 2. All horse, cable, steam, electric or other railway companies now existing or hereafter created in any city already incorporated or hereafter organized shall be required to pave or repave at their own cost all the space between its different rails and tracks and also a space two feet wide outside of the outside rails of the outside tracks, and the tracks herein referred to shall include not only the main tracks but also all side-tracks, crossings and turnouts used by such companies, and where two or more companies occupy the same street or alley with separate tracks, then each company shall be responsible for its proportion of the surface of the street or alley occupied by all the parallel tracks as herein required. Such paving or repaving by such railway companies shall be done at the same time and shall be of the same material and character as the paving or repaving of the streets or alleys upon which said railway track or tracks is located, unless other material be specially ordered by the board of public works.

Such railway companies shall be required to keep that portion of the street which they are herein required to pave or repave in good and proper repair, using for said purpose the same material as the street upon which the track or tracks are laid at the point of repair or such other material as the board of public works may require and order; and as streets are hereafter paved, or repaved, street railway companies shall be required to lay, in the best approved manner, a rail to be approved by the

board of public works. The tracks of all railway companies, when located upon the streets or avenues of the city shall be kept in repair and safe in all respects for the use of the traveling public, and said companies shall be liable for all damages resulting by reason of neglect to keep such tracks in repair, or for obstructing the streets or avenues of such city. For injuries to persons or property arising from the failure of such company to keep their tracks in proper repair and free from obstructions, such company shall be liable and the city shall be exempt from liability. The word "companies" as used in this act shall be taken to mean and include any persons, companies, corporations or associations owning or operating any street or other railway in any such city.

Sec. 3. In the event of the refusal of such company to pave, repave or repair as required in the foregoing sections, when so directed by the council, upon the paving or repaving of any street upon which their track is laid, the council shall have power to pave, repave or repair the same and the cost and expense of such paving, repaving or repairing may be collected by levy and sale of any property of said street railway company, in the same manner as special taxes are now or may be collected. Special taxes for the purpose of paying the cost of any such paving or repaving, macadamizing or repairing of any such street railway, may be levied upon the track, including the ties, iron, roadbed, and right of way, side-tracks, and appurtenances, including buildings and real estate belonging to any

such company or person and used for the purpose of such street railway business, all as one property; or upon such parts of such track, appurtenances and property or any part thereof as may be within the district paved, repaved, macadamized or repaired, and shall be a lien upon the property levied upon from the time of the levy until satisfied. No mortgage, conveyance, pledge transfer, or incumbrance of any such property or of any rolling stock or personal property of any such company or person, created or suffered by a company or party, after the time when any street or part thereof upon which any street railway shall have been laid, shall have been ordered paved, repaved, macadamized or repaired, shall be made or suffered except subject to the lien of such special taxes, if such levy be in contemplation. The city collector shall have the power and authority to sieze any personal property belonging to any such person or company for the satisfaction of any such special taxes when delinquent, and to sell the same upon advertisement and in the same manner as constables are now or may be authorized to sell personal property, upon execution at law; but failure so to do, shall in no wise affect or impair the lien of the tax or any proceeding allowed by law for the enforcement thereof. The railroad track or any other property upon which such special taxes shall be levied, or so much thereof as may be necessary, may be sold for the payment of such special taxes in the same manner and with the same effect as real estate upon which such special taxes may be levied, may be sold.

It shall also be competent for any such city to bring a civil action against any party owning or operating any such street railway, and liable to pay said taxes, to recover the amount thereof, or any part thereof delinquent and unpaid in any court having jurisdiction of the amount, and obtain judgment, and have the execution therefor and no property, real or personal, shall be exempt from any such execution.

Provided, That real estate shall not be levied upon by execution except by execution out of the district court on the judgment therein, or transcript of judgment filed therein, as is now or hereafter may be provided by law. No defense shall be allowed in any such civil action except such as goes to the groundwork, equity and justice of the tax, and the burden of proof shall rest upon the party assailing the tax. In case part of such special tax shall be shown to be invalid, unjust and inequitable, judgment shall be rendered for such amount, as is just and equitable. It shall be competent for the counsel upon the written application of any company, association, corporation or person, owning any such street railway, to provide that such special taxes shall become delinquent and be payable in installments, as in case of taxes levid upon abutting real estate as hereinafter provided, but such application shall be taken and deemed a waiver of any and all objections to such taxes and the validity thereof. Such application shall be made at or before the final levy of such taxes. The provision of this act in regard to the levy, collection, and enforcement of special taxes to pay

the costs of paving, repaving, macadamizing or repairing between the rails of street railways shall apply to such special taxes hereafter levied.

Sec. 4. The council shall have power, in any paving district, and it shall be their duty before the work of paving or repaving is done therein, to require water, gas and sewer connections to be made under such regulations and at such distances from the street mains to the line of the property abutting upon the street ordered paved or repaved, as may be prescribed by ordinance and shall require that such waterpipe connections may be made by any water works company owning the waterpipe main, and that such gas pipe connections may be made by any gas pipe company owning the gas pipe main. And upon neglect or failure of the water or gas companies to do the same, the board of public works may cause the same to be done, and the cost thereof shall be deducted from any indebtedness of the city to such companies, and no bills shall be paid to the said companies by the city until all such expense for pipe laying shall have been liquidated. And the council shall also have power, at any time, to assess the cost of any sewer connections and also of any water connections when the city owns the water and water pipe main upon the property opposite such connections, and to such depth as the council, sitting as a board of equalization, shall deem just and equitable.

Sec. 5. All special taxes to cover the cost of any public improvement herein authorized shall be levied and assessed on all blocks,

lots, parts of blocks and lots, lands and real estate bounding, abutting or adjacent to such (improvements or within the districts created for the purpose of making such improvement, to the extent of the benefits to such) lots, parts of lots, lands and real estate by reason of such improvement such benefits to be equal and uniform. Such assessments may be acording to the square foot or foot frontage, and may be pro-rated and scaled back from the line of such improvement and an allowance made for corner lots so that they shall not be assessed at full rate on both streets, according to such rules as the board of equalization shall consider fair and equitable; and all such assessment and finding of benefits shall not be subject to review in any legal or equitable action, except for fraud, gross injustice or mistake. *Provided*, That when any public improvement shall extend into or through any unsubdivided tract or parcel or parcels of land, said taxes shall be levied so as not to be charged against the real estate adjoining such improvement for a greater depth than the average distance through the subdivided real estate to be taxed for said purpose.

Sec. 6. It shall be sufficient, in any case, in making a levy or assessment of any tax, to describe the lot or piece of ground as the same is platted and recorded, although the same may belong to several persons; but in case any lot or piece of ground belongs to different persons, the owner of any part thereof may pay his proportion of the tax on such lot or piece of ground, and his proper share may be determined by the city collector.

Sec. 7. The cost and expense of grading, filling, culverting, curbing, guttering, or otherwise improving, constructing or repairing streets, avenues, alleys and sidewalks at their intersections, may be included in the special tax levied for the construction or improvement of any one street, avenue, alley or sidewalk, as may be deemed best by the council.

Sec. 8. Special taxes may be levied as the improvements are completed in front of or along, or upon any block or lot or part thereof or piece of ground, or at the time the improvement is entirely completed, or otherwise, as shall be provided in the ordinance levying the tax.

Sec. 9. When any special tax is levied it shall be the duty of the city recorder to deliver to the city collector a certified copy of the ordinance levying such tax, and such collector shall without delay give at least five days notice in one or more newspapers having general circulation in said city, of the time when such tax will become delinquent.

Sec. 10. Special taxes may be levied by the council for the purpose of paying the cost of constructing or reconstructing sewers or drains within the city; such taxes to be levied on the real estate lying and being within the sewerage district in which such sewerage or drain may be situated, to the extent of the benefits to such property, by reason of such improvement, the benefits to such property to be determined by the council, sitting as a board of equalization.

Provided, That in cases where the council sitting as such board of equalization, shall

find such benefits to be equal and uniform, such levy may be according to the front feet or square feet of lots or real estate within said sewerage district or according to such other rule as the council sitting as such board of equalization may adopt for such distribution or adjustment of such cost upon the lots or real estate in such district benefitted by such improvement; and all taxes or assessments made for sewerage or drainage purposes shall be collected in the same manner as other special assessments, and shall be subject to the same penalty.

Sec. 11. There shall be in each city of the first class a board of public works which shall consist of five members, residents and freeholders of the city, to be appointed by the council before the first Monday of July, 1890, for the term of two years. The council shall designate one of the members of such board to be the chairman thereof. The salaries of the members of such board of public works shall be fixed by ordinance and the salary of the chairman shall not exceed fifteen hundred ($1,500) dollars per annum and the salary of each of the other members shall not exceed the sum of five hundred ($500) dollars per annum. Each member of said board shall, before entering upon the discharge of his duties, take an oath to faithfully discharge the duties of his office, and enter into a bond to such city with two or more good and sufficient sureties, to be approved by the council, the bond of the chairman to be in the sum of fifteen thousand ($15,000) dollars, each conditioned for the

faithful performance of his duties as a member of such board of public works.

The chairman of such board shall devote all necessary time to the performance of his official duty, and no member of such board shall ever be directly or indirectly interested in any contract entered into by them on behalf of such city, nor shall he be interested either directly or indirectly in the purchase of any material to be used or applied in or about the use or purposes contemplated by this act. It shall be the duty of such board of public works, and it shall have power to make contracts on behalf of the city, for the performance of all such work and the erection of all such improvements as may be ordered by the council, but all such contracts shall be subject to the approval or rejection of the council; to superintend the performance of all such work and the erection of such improvements, except the supervision of the construction of city halls, market houses, jails or other public buildings. It shall also be the duty of said board to approve the estimates of the city engineer which may be made from time to time, of the value of work as the same may progress; to accept any work done or improvement made, when the same shall be fully completed according to contract, subject, however, to the approval of the council, and to perform such other duties as may be devolved upon them by ordinance. Any member of such board may at any time be removed from office by a vote of two-thirds of the members of the council, for sufficient cause and the proceedings in that behalf shall be entered in the journal of the council. *Pro-*

vided, That the council shall previously cause a copy of the charges preferred against such member sought to be removed, and notice of the time and place of hearing the same, to be served on him at least ten days previous to the time so assigned and opportunity to be given him to make his defense.

Sec. 12. Nothing in this act shall be so construed or held to authorize any city of the "first or second class," to issue bonds of the city either as district bonds, for paving the streets, or for paving said street intersections, or spaces opposite alleys in said city or for any purpose whatever to any amount beyond that fixed as the limit of the bonded indebtedness, of said city by congressional enactment.

Sec. 13. In all cases before the levy of any taxes for any improvements provided for in this act the city council shall give notice of intention to levy said taxes naming the purposes for which the taxes are to be levied, which notice shall be published at least twenty days in a newspaper published within such city. Such notice shall describe the improvements so proposed, the boundaries of the district to be affected or benefitted by such improvements; the estimated cost of such improvements and designate the time set for such hearing. If at or before the time so fixed written objections to such improvements signed by the owners of one-half of the front feet abutting upon that portion of the street, lane, avenue or alley to be so improved be not filed with the recorder the council shall be deemed to have acquired jurisdiction to order the making of such improvements.

Sec. 14. This act shall take effect on the first day of May one thousand eight hundred and ninety.

Approved March 13, 1890.

No. 127.

Supp. Brief of Kimball for Appt.

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Filed Nov. 3, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 127.

OGDEN CITY, APPELLANT,

vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, ET. AL.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

APPELLANT'S SUPPLEMENTARY BRIEF.

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellant.

JAMES N. KIMBALL,
Of Counsel.

IN THE

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vs.

JAMES C. ARMSTRONG, WILLIAM DRIVER, J. H. SPARGO, ET. AL.

APPELLANT'S ADDITIONAL AND SUPPLEMENTAL BRIEF.

JURISDICTION.

Appellant's contention is that the publication of the notice of intention to pave for the full time required by law, and in proper form, and the giving of notice to the abutting owners when to appear and file their written objections, if any they had, gave the city council jurisdiction to decide upon all subsequent matters necessary to give it full jurisdiction or otherwise;—in this case upon the sufficiency of the protests. This is the only claim we make for the

notice of intention. The passing upon the objections was a judicial act. The city council decided that the owners of one-half of the frontage in feet abutting upon the improvement, had not filed written objections to the improvement, and of course, decided that it had jurisdiction to make the improvement. It had a right to make a decision of some kind.

If such decision is wrong and more than one-half did protest, and if extrinsic facts are necessary to be proven to show such facts, have the plaintiffs by a proper pleading brought themselves within the range of equitable relief?

Appellants contend that plaintiffs have done no such thing.

First.—If the tax is valid upon its face, as contended for by plaintiffs, and because of some extrinsic facts not shown on the face of the record, it is void, then plaintiffs must *explicitly allege all such facts* making it void, in their complaint. If the city council conspired to falsely decide as to the protests, or made a mistake, then such conspiracy, fraud or mistake, must be specifically pleaded in their complaint.

Heywood vs. City of Buffalo, 14 N. Y., 534, pg. opin. 541-2.

Davis vs. City of Chicago, 11 Wall. (U. S.) 110-111.

High on Injunctions, (3d Ed.) Secs. 34, 491, 492.

Ritter vs. Patch, 12 Cal. 298.

Coulson vs. Harris, 43 Miss. 728

The court in rendering its opinion in Heywood vs. City of Buffalo, says:

> "The complaint should have alleged distinctly and plainly that the proceedings were apparently within the powers of the common council, *and upon their face were valid*, and created a valid lien; and it should then have alleged that, notwithstanding such apparent validity, the proceedings were wholly void by reason of certain extrinsic matters, which should be stated, and which it should appear by the complaint, could only be established by other evidence. *These facts are the very grounds of the jurisdiction.* The doctrine established by the decisions is substantially this, that if the proceedings are void upon their face, they form no cloud upon the title no ground of interference by a court of equity, and if they are not void upon their face, but merely voidable or irregular, (what appellee contends for here), a court of equity will not take cognizance of them unless other facts are alleged sufficient to bring the matter clearly within some acknowledged head of equity jurisdiction. This is a sound and salutary rule, which should be steadily adhered to upon considerations of public interest and convenience if no other."

What is here said is clearly applicable in regard to what must be alleged as to multiplicity of suits, irreparable injury and cloud upon title. The facts must be stated in the complaint why a multiplicity of suits would be occasioned, why the free hold would suffer irreparable injury and why a cloud would be

cast upon the title. "The mere allegations that plaintiffs are without adequate remedy at law, etc., is a mere inference and must be made out by facts averred and proven."

> Shelton vs. Platt, 139 U. S., 591 pg. opin. 594-5-7.

In Dows vs. City of Chicago, 11 Wallace, U. S., Mr. Justice Field, quoting with approval from Heywood vs. City of Buffalo, supra, says:

> "This case is in conformity with the views herein expressed. Whenever a case case is made by the *pleadings* falling within either of these exceptions, the court said that equity would interfere to arrest excessive litigation, or prevent the irreparable injury or remove a cloud upon the title, but would not interfere where none of these circumstances existed. Upon principle this must be the case. The equitable powers of a court can only be invoked by the presentation of a case of equitable cognizance. There can be no such case at least in the federal courts, where there is a plain and adequate remedy at law."

On page 110 Mr. Justice Field said:

> "It *must appear* that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title, before the aid of a court of equity can be invoked."

How can it appear except by the allegations of the complaint. The mere assertion of the fact that multiplicity of suits, irreparable injury and cloud

upon title, is not sufficient. The allegations in the complaint must clearly state all the facts, showing these things should the tax be enforced. We submit that no such allegation or any allegation appear in the complaint showing that the collection of this tax would either cause a multiplicity of suits, work irreparable injury to the freehold, or cast a cloud upon the title. It would seem that the law as expressed in the case of Heywood vs. the City of Buffalo is settled in this court.

All facts appear on face of record.

Let us suppose that this tax is illegal because the owners of one-half or more of the frontage protested as required by Section XIII, Chapter 41, laws 1890, Utah. Does not all this appear on the face of the records of the city council? If it does so appear, then the plaintiffs have a speedy and adequate remedy at law. All the facts relied upon, viz., objections to the improvement, must be and were filed with the city recorder with the date of the filing indorsed thereon and hence became and are a part of the proceedings of the city council to levy the tax, and these papers with the indorsements, are and were at all times of record. The proceedings of the city council *only* is what must be considered. All the facts relied upon to invalidate this tax appear upon the face of those proceedings. It required no evidence *de hors* the record —or extrinsic evidence to prove these facts. Upon that record as it stood then and now the city council made its decision, viz., *that not one-half of the owners of the front feet had filed written objections as provided by statute.* That decision can only

be attacked for fraud or mistake on part of the council, but neither is alleged in the pleadings.

An examination of the record in this case will conclusively show that all these facts appear in the record of the city council as follows.

The original protest is set out in the complaint at pages 7 and 8, and marked filed as of March 28th, 1892, at 9:55 a. m.

All the withdrawals are found in the record at pages 144 and 145 and all are indorsed "filed" with the date.

The Elliott report is found at page 27 of record among the proceedings of the city council and all other proceedings in any way bearing upon this question or the proceedings to pave are found in the record at page 26 to 32.

These protests and withdrawals must be filed under the provisions of the law just quoted or the city council could not have considered them at all.

Now, again, if anything is necessary to be shown in the proceedings of the council in order to give it jurisdiction, or to deprive it of jurisdiction, such omission must have been the result of *fraud or mistake*; but does counsel claim that plaintiffs can have any standing in equity on the ground of fraud or mistake without having alleged either.

Appellees are now claiming that this tax is legal upon its face, while they at *the same time they are trying to show its illegality by facts which appear on the face of the proceedings of the city council to levy the tax*. Foulger, judge, in Marsh vs. City of Brooklyn,

59 N. Y. 281, states the conditions to entitle a party to invoke the aid of a court of equity to be:

> "When the claim or lien appears to be valid on its face, and when the defect can only be made to appear by extrinsic evidence which will not necessarily appear in proceedings by the claimant to enforce the lien."

This rule is cited and approved in Gest vs. the City of Brooklyn, 69 N. Y., 514, where the court uses these words:

> "Assuming therefore, that the points urged by the learned counsel for the appellant, shows substantial defects sufficient to invalidate the apportionment, and all subsequent proceedings, the plaintiff is in no danger of legal injury to his property. When attacked, the proceedings must all be shown by the claimant, except those immediately connected with the sale, such as notice, etc., and I do not understand that any defects are alleged in respect to them. The certificate given at the sale shows that the sale was made by the collector, and if he had no power to sell, a reference to the statute would be sufficient. So when the tax roll was produced, the want of a verification would appear on the face of the instrument."

So appellant says: The want of jurisdictional facts, if any are wanting, must necessarily appear on the face of these proceedings, and if facts appear in the proceedings, which deprive the city council of jurisdiction, then all the plaintiffs have a remedy at law.

Ewing vs. City of St. Louis, 5 Wall (U. S.) 413, pg. opin. 417 and 418.

Counsel for appellees admit the rule that no cloud can be cast upon the title if the proceedings are void upon their face. (Respondent's brief, page 49.) Appellant's position is:

First.—If the city council wrongfully took jurisdiction in face of the facts shown in or upon the face of its own proceedings, that it did not have it, then the tax is absolutely void, and plaintiffs must seek their remedy at law.

Second.—If the city council had wrongfully and falsely made its record to show facts sufficient to give it jurisdiction when such facts never existed, then in order to get into equity plaintiffs must plead all such facts and even in such case *certiorari* is a plain and perfect remedy, under Compiled Laws of Utah, sections 3718 to 3728.

CERTIORARI A PROPER REMEDY.

The remedy of the Writ of *Certiorari* is not only a common law remedy, but is one expressly provided by the statutes of the then territory of Utah. The chapter entitled "Writ of Review," section 3817 to 3728, inclusive, of Compiled Laws of Utah, 1888, is as follows:

> Sec. 3718. The writ of certiorari may be denominated the writ of review.
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> Sec. 3719. A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

Sec. 3720. The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

Sec. 3721. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.

Sec. 3722. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceeding (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party in the meantime to desist from further proceedings in the mat- to be reviewed.

Sec. 3723. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court, but if omitted, the power of the inferior court or officer is not suspended or the proceedings stayed.

Sec. 3724. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the court.

Sec. 3725. The review upon this writ cannot be extended, further than to deter-

mine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

Sec. 3726. If the return to the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below.

Sec. 3727. A copy of the judgment, signed by the clerk, must be transmitted to the inferior tribunal, board or officer, having the custody of the record or proceeding, certified up.

Sec. 3728. A copy of the judgment, signed by the clerk, entered upon or attached to the writ and return, constitute the judgment roll.

It would seem that this statute covers just such cases as this. Section 3719 provides:

Sec. 3719. A writ of review may be granted by any court, except a probate or justice's court, when an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

The findings of the district court and of the Supreme Court of Utah, are to the effect that the owners of more than one-half of the frontage in feet in said paving district protested against the contemplated improvement. The same facts are alleged in

the complaint. Counsel for appellees maintain that the written protest of these property owners when filed, operated to prevent the city council from acquiring jurisdiction; that nevertheless it proceeded as if it had jurisdiction and levied the assessment complained of. If these things are true then clearly the city council exceeded its jurisdiction and there being no appeal from its decision, and no "plain, speedy and adequate remedy" as counsel contends, and which for the purposes of this argument we may concede, it would seem that the case falls clearly within the provisions of this section, and by it appellees are afforded ample remedy.

> "It has been uniformly held by the courts that if certiorari affords a complete remedy, courts of equity will not interfere."
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> Ewing vs. City of St. Louis, 5 Wall, (U. S.) 413 supra.
>
> Gilkey vs. Watertown, 141 Mass. 317.

As we have seen, if the city council had the authority to determine the question as to whether more or less than one-half of the owners of the frontage in feet had protested, and in determining this question in favor of their jurisdiction, placed their determination beyond the collateral attack of the appellees, as they seek to do by this action, then they must fail. If, on the other hand the jurisdiction was never acquired by reason of the protests filed, then appellee must fail because their remedy is by *certiorari*.

> Royce vs. Janney, 50 Iowa, 676.
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> "When the remedy by *certiorari* is invoked every fact that goes to determine the

> jurisdiction or lack of it of the inferior tribunal, may be inquired into."
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> Hastings vs. City and County, 18 Cal. 49, pg. opinion, 57, 58 and 59.
>
> Whiting vs. B. of D, 14 Cal. 480, pg. opin., 500-1-2.

Field, C. J., who delivered the opinion in Hastings vs. City and County of San Francisco, supra, on page 58 of the opinion, says:

> "All such bodies, without any special legislative provision by the general law, are subject, with certain exceptions, to the process of mandamus to enforce the performance of the duties devolved upon them, and to the writ of *certiorari* for the review of their acts, when partaking of a judicial character, and in other ways are within the control of judicial proceedings."

If *certiorari* has been invoked instead of the remedy adopted in this case, when this suit was begun and the proceedings of the city council found to be void, the tax now complained of could never have been levied. This sufficiently does away with the question of multiplicity of suits, because if plaintiffs or any of them had adopted the legal remedy open to them as provided by statute for just this kind of case, it would have ended the litigation for all time, and as to all parties interested.

MUTIPLICITY OF SUITS.

Counsel for appellees seem to be basing their right to maintain this suit in equity, *solely* on the ground that the collection of this tax will engender a

multiplicity of suits—practically admitting that they are unable to show that a cloud will be cast upon their title. This position raises two questions:

First.—Will injunction lie to restrain the collection of a tax upon the sole ground of multiplicity of suits, when no cloud will be cast upon the title and the free-hold suffer no irreparable injury?

Second.—Appellees having a plain and adequate remedy by *certiorari*, and having neglected or refused to adopt it, can they now invoke the jurisdiction of a court of equity on the ground of multiplicity of suits, or in fact upon any grounds?

Not admitting that the allegations of the complaint bring this case within any of the recognized exceptions to the rule that equity will grant relief in this class of cases by way of injunction to restrain the collection of a tax, we maintain that equity will not grant relief on the sole ground of multiplicity of suits.

We desire, however to argue the second question more at length. Appellants maintain, and we think without fear of successful contradiction, that *certiorari* is and was a plain, speedy and adequate remedy, and that it was open to any one or all of the plaintiffs, and that the results of that remedy would have been to settle all the questions that could possibly have been raised or be raised between any one or all of these plaintiffs and Ogden City. And as the plaintiffs neglected and refused to adopt that remedy they cannot now invoke the jurisdiction of a court of equity to relieve them of their mistake. To allow them to do so on the ground of multiplicity of suits, would be to reward the laches and neglect which has deprived each of his right to seek equitable relief.

McKinstry, J., in Lent vs. Tillotson, 72 Cal., on page 437 of opinion, in a case in many respects almost exactly like the one at bar, in commenting upon this subject, says:

> "It may be urged, however, that equity should entertain jurisdiction of a suit like the present 'to prevent multiplicity of actions.' The multiplicity of actions, which, it may be said (although in the absence of averment) the complainants here seek to avoid, would not injuriously affect any of them. In the mere external facts that all their remedial rights arose at the same time, are of the same kind, involve similar questions of fact, and depend upon the same questions of law. The question still remains: Will a suit be entertained to prevent multiplicity when it appears that no one of the plaintiffs could separately demand equitable relief? The cases sometimes supposed to do so, do not, when examined, answer the foregoing question in the affirmative."

On page 438 the same judge says:

> "Even if there are cases in which each of the several plaintiffs would be allowed to maintain a separate suit in equity, but yet all would be entitled to unite in one suit for the determination of questions which might arise in separate actions at law, the result herein must be the same. The plaintiffs by their acquiescence and consent, having lost their right to ask the aid of equity by injunction, the court ought not to have granted to all that which it should refuse to each. To grant the injunction to all, because each may be subjected to a separate action at law, is to reward the laches and neglect which has de-

prived each of his right to seek equitable relief."

The learned judge bases his opinion and decision (see page 434 of the opinion) on the grounds that the plaintiffs had a plain, speedy and adequate remedy at law by means of the writ of *certiorari*, and *having neglected* and *refused to use it*, they could not adopt the wrong remedy and ask a court of equity to take jurisdiction to help them out, and in support of his position he cites:

Ewing vs. City of St. Louis, 5 Wall, U. S. 413.

S. V. W. Co. vs. Bryant, 52 Cal. 132.

People vs. El Dorado, 8 Cal. 61.

People vs. Board of Delegates, 14 Cal. 479.

Cooley on Tax. p 771- 2nd ed.

COLLATERAL ATTACK.

Counsel for appellees (respondent's brief, page 33), says this is not a collateral attack on the judgment of the city council, meaning, of course the judgment of the counsel in deciding that the written objections to the improvement were not sufficient to legally prevent it from levying the tax. Appellants contend that counsel is in error in this, and that the plaintiffs in this action *are* collaterally attacking that judgment.

Van Fleet on Collateral Attack thus defines both direct and collateral attack:

"A direct attack on a judicial proceeding is an attempt to avoid or correct it in

> some manner provided by law. A motion for new trial, a motion to vacate, modify or correct a judgment according to statute, or the practice of the court, appeals, writ of error, certiorari. * Bills in equity or complaints and petitions *under the codes* to set aside, modify or correct judgment for fraud, accident or mistake."

It will be observed that bills in equity to correct, modify or set aside judgments, are *unknown to the code of Utah.* It will also be observed that in order to be a direct attack, the bill in equity must be a remedy provided by statute.

At Section 3, the author defines collateral attack:

> "A collateral attack on a judicial proceeding is an attempt to avoid or evade it or to deny its force and effect in some manner not provided by law."

The author in the last section, calls attention to the case of Morrill vs. Morrill, 25th Pac. Rep. 362 and 364, and says:

> "This definition assumes that a proceeding to annul or enjoin is always direct. It is direct *only* when pursued in the time and manner provided by law, and against one who is not a *bona fide* purchaser. As all judicial records must be tried by inspection, an attempt to overturn or overhaul them by evidence *de hors* in a proceedings not provided by law, *is a collateral attack.*"

At section 4, the author says: "All attempts to to use *extrinsic evidence is a collateral attack.*" In illustrating a case in which extrinsic evidence was offered, it is stated: "The court was undoubtedly

correct in holding the attack to be collateral, as the chancellor never interfered in that kind of a case, and the minority were clearly wrong in their contention *that a record fair on its face, could be falsified in another action.*"

At section 6 the author says: "An attempt to set aside a judgment by motion of petition filed at the wrong time, or in the wrong court; or an attempt to do so by the *wrong kind of proceeding*, is a collateral attack."

This is an attempt to set aside that judgment by the wrong kind of a proceeding. *Certiorari*, or *prohibition*, remedies plainly provided by the Utah law, would have been the proper remedy.

The difficulty in defining what is and what is not collateral attack undoubtedly arises from a lack of understanding of what constitutes jurisdiction to render the judgment.

> "The supreme power in each civilized state enacts general laws fixing the rights of persons under its dominion. Then it establishes judicial tribunals for the purpose of declaring and fixing such rights in particular cases. The power given by law to the tribunal to fix such rights is called its jurisdiction. *Jurisdiction is simply power.* The Supreme Court of the United States has defined it to be 'the power to hear and determine.' Any power possessed by the tribunal, either affirmative or negative, is jurisdiction. The principal trouble has arisen from the mistaken conception that jurisdiction depends upon facts or the actual existence of matters and things, instead of upon the allegations

made concerning them. If certain matters and things are alleged to be true and relief prayed which the tribunal has power to grant if true, that gives it jurisdiction over the proceedings, and it must proceed and determine them or neglect its duty. Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court. The question, is have the parties shown a right to the relief which they seek, and has the court authority to determine whether or not they have shown such a right? A wrongful determination of the question first stated is error, but can be examined only on appeal or certiorari. The other question is the question of jurisdiction, which may be defined: Any movement in the cause; authority to move in a cause, even to determine that there is authority, the power to act upon a given state of facts and likewise to decide when they exist. Lawful authority to hear and determine the cause upon the allegations made; power to inquire into the facts; to apply the law and declare the judgment; the authority to decide the question at all; the power to hear and determine."

Van Fleet Collateral Attack, Sec. 58.

It can hardly be disputed that the city council under the law having first published the notice of intention and having created the district and having notified abutting owners to file written objections to the improvement, had the power and jurisdiction to decide upon the sufficiency of those written objections. The council on that occasion might take into consideration whether or not the parties, some or all,

owned the property which they claimed to own in the protest, and if so whether or not they owned the number of feet frontage mentioned in the protest, and whether or not the protest itself was in legal form or was for any purpose the written objections contemplated by the statute. All these things required action of a judicial nature, which in contemplation of the law under which they acted, they were compelled to decide or neglect their duty, and it makes no difference whether such decision was *right* or *wrong*. It cannot be collaterally attacked, because the statute of Utah provides a legal remedy by *certiorari* or *writ of review* covering just this class of cases and such remedy would have been speedy and adequate; would have been much less costly than the one adopted and would have fully settled the matter for all time and for all parties. It must be remembered that this action was brought before the assessment complained of was made.

Van Fleet on Collateral Attack, Sec. 50, says:

> "The *truth* of the allegation does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction necessarily has to be determined from the allegations assuming them to be true. This point is so important that it should not be overlooked. The question of jurisdiction does not depend upon the truth or falsehood of the charge, but upon its nature; it is determinable on the *commencement*, not at the *conclusion* of the inquiry."

So appellant says that the city council having published the notice of intention and taken such other preliminary steps as was necessary (and which were

decided properly taken by the Utah Supreme Court when this case was first before it), acquired the jurisdiction and power to pass upon the protests before any protests were filed because the jurisdictional power must have been in the council for that purpose before it could have entertained the protests at all.

In commenting upon a case very similar to the one at bar, the author farther along in the same section, says:

> "By making the order granting the prayer of the petition, the board must be taken to have decided that the company was such an one as was under the statute entitled to aid, and if in this respect it has committed an error, the decision is nevertheless binding and conclusive unless appealed from, and cannot be attacked collaterally, *as by injunction upon the collection of the tax.*"

At section 61, the same author says:

> "But why any distinction should be made between special and general proceedings I cannot understand," and farther along in the same section the author says: "Enough must appear either in the application or the order or somewhere on the face of the proceedings to call upon the court to proceed to act, and all agree that when that does appear the court had properly acquired jurisdiction, or in other words is properly set to work. And when this is so the proceeding is not void collaterally."

This is a collateral attack.

> Montgomery vs. Wassam, 15 N. E. Rep. 795.
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> Montgomery vs. Wassam, 19 N. E. Rep. 184.

In 15 N. E., at page 795, supra., in which just this class of case is under consideration, the Supreme Court of Indiana says:

> "The suit is clearly a collateral assault upon the proceedings of the county board in the establishment and construction of the drain."

In 19 N. E. Rep., supra., the same court says:

> "In so far as the appellant's complaint challenges the sufficiency of the notice it is unquestionably a collateral attack; and as there is some notice and that notice has been adjudged sufficient by the tribunal invested in the first instance, with the authority of determining jurisdictional facts, the attack is unavailing."

Respectfully submitted,

R. H. WHIPPLE,
T. D. JOHNSON,
Attorneys for Appellants.

JAMES N. KIMBALL,
Of Counsel.